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Supreme Court, U.S.
FILED
991028 DEC 14 1999
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1999 TERM

MANUEL COSTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court resolve the conflict between the Eleventh Circuit in the instant case, and other circuits as to whether ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and ***Hill v. Lockhart,*** 474 U.S. 52, 106 S.Ct 366, 88 L.Ed.2d 203 (1985), require a 2255 Petitioner who received gross misadvice regarding the potential length of his sentence to show that if the District Court granted his petition, that: (1) the Government and the Petitioner would enter into a plea agreement that would require the district court to impose sentence(s) more favorable (from a parole eligibility standpoint) than the sentences he is now serving, and (2) that the district court would accept the plea agreement and sentence him accordingly?

II. Whether a 2255 Petitioner is entitled to an evidentiary hearing, when the Government concedes that trial counsel was ineffective in failing to advise Petitioner under Title 42 U.S.C. § 4205, that if he went to trial, at sentencing the District Court could retard his parole eligibility from 10 years to 20 years, and where the Petitioner submitted his own affidavit stating that he would have plead guilty if properly advised,

and detailed sworn affidavits of others stating that before trial, he admitted his guilt to them, and that he would have plead guilty if he knew his parole eligibility could have been retarded from 10 to 20 years?

III. Where a 2255 Petitioner shows and the Government concedes that trial counsel was ineffective in failing to advise the Petitioner that the trial court could retard his parole eligibility under Title 42 U.S.C. § 4205, and thus require him to serve an additional 10 years of incarceration before being parole eligible, under ***Hill v. Lockhart,*** 474 U.S. 52, 106 S.Ct 366, 88 L.Ed.2d 203 (1985), is such evidence sufficient to satisfy the prejudice prong of ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)?

IV. Whether District Courts should fashion a remedy for a 2255 Petitioner requiring the Government to re-offer the prior plea offer, where the Government concedes that trial counsel was ineffective in failing to advise Petitioner that if he went to trial, at sentencing the District Court could retard his parole eligibility from 10 years to 20 years, and where affidavits Petitioner submitted showed that he admitted his guilt to others, sought plea negotiations, and rejected the Government's plea offer only because he

believed their was a small difference in his potential period of incarceration if he went to trial as opposed to pleading guilty?

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OPINIONS BELOW

The opinion and order denying petition for rehearing of the Court of Appeals for the Eleventh Circuit are unpublished opinions. Copies of the opinion and the order are appended hereto in the Appendix (hereinafter "Pet. App.") at 1 and 2 respectively. Prior to the opinion affirming the district court's order, the Eleventh Circuit entered an opinion granting a certificate of appealability.

The appeal to the Eleventh Circuit arose from a Order Denying Certificate of Appealability and a Final Order of Dismissal of Petitioner's motion to vacate, set aside or reduce sentence entered on May 12, 1998, by the Honorable William J. Zloch, United States District Court Judge, Southern District of Florida. Said Final Order affirmed a Report and Recommendation To District Judge entered on April 20, 1998, by the Honorable Barry Seltzer, United States Magistrate Judge. The foregoing orders are appended in Pet. App. at 5, 6, and 7 respectively.

The foregoing proceedings arose from the judgment and commitment order entered in the trial court on August 11, 1989, (Pet. App. at 54-58), and an opinion of the Court of Appeals for the Eleventh Circuit, entered on November 25, 1991, denying an appeal therefrom, reported at ***United States v. Manuel Costa, et al.,*** 947 F.2d 919 (11th Cir. 1991). *See,* Pet. App. at 26-49. An unpublished order entitled On Petition(s) for Rehearing and Suggestion(s) for

Rehearing En Banc subsequently denied such relief on January 27, 1992. *See,* Pet. App. at 50. Thereafter, this Court entered an Order on October 13, 1992, denying certiorari review, which is reported at 506 U.S.929, 113 S.Ct. 360, 121 L.Ed.2d 272 (1992)(White, Conner, *dissenting*). *See,* Pet. App. at 51-53.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 22, 1999. A timely Petition for Rehearing *En Banc*, as filed on July 12, 1999. On September 15, 1999, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*. Thereafter, October 1, 1999, the Eleventh Circuit issued a Mandate on its June 22, 1999 Judgment.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. . . .

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus....

Rule 8, 28 U.S.C.A. foll. § 2255

Rule 8. Evidentiary Hearing

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations . . . .

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

18 U.S.C. § 4205 (a) and (b)

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine . . . .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999.

No. _____

MANUEL COSTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Manuel Costa, Defendant, Appellant and Petitioner in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on June 22, 1991, and for which a Mandate issued on October 1, 1999.

STATEMENT OF THE CASE

A. *Basis for Federal Jurisdiction in District Court:*

The District Court was vested with jurisdiction pursuant to Title 28 U.S.C. § 2255 and the Sixth Amendment of the United States Constitution to entertain *Manuel Costa's* motion to vacate, set aside or correct a sentence, because such was imposed in violation of his right to effective assistance of counsel as guaranteed by the Sixth Amendment.

B. *Statement of Facts:*

• *Introduction:* This case raises several issues of national importance:

(1) The Eleventh Circuit, in affirming the denial of *Costa's* 2255 motion as well as his request for an evidentiary hearing, expanded the prejudice prong of ***Strickland*** to require the Petitioner to prove what would happen *after* a petition was granted on his behalf. The Eleventh Circuit held that *Costa's* petition and request for evidentiary hearing were denied because: (a) he failed to show that the Government presently would enter into a plea agreement with him that would require the district court to impose sentence(s) more favorable than the sentence he is now serving, and (b) that the district court would accept the plea agreement and sentence him accordingly. No other court has ever required a petitioner to satisfy this near impossible

burden, which would necessarily require the calling of the prosecutor and the district court judge as witnesses.

(2) Related to the above issue is whether the Eleventh Circuit improperly applied the above standard to deny the Petitioner an evidentiary hearing.

• *Proceedings Below:* On December 17, 1996, *Manuel Costa* filed a Petition to Vacate, Set Aside or Reduce Sentence Pursuant to Title 28 U.S.C. § 2255 and requested an evidentiary hearing (hereinafter "2255 Motion"). [Crim-D.E. 1031].

Costa's 2255 Motion alleged, *inter alia,* that his trial counsel was ineffective during plea bargaining stage before the trial court, because counsel failed to advise *Costa* that if he went to trial, the District Court could retard his parole eligibility from 10 to 20 years - thereby effectively lengthening the actual time he would have to serve in prison by approximately 10 years. [Crim-D.E. 1031]. *Costa's* motion was supported by affidavits from trial counsel, appellate counsel, his brother/co-defendant, two friends and himself.

The Government's Response conceded that counsel's advice was ineffective, but argued that *Costa* was not prejudiced because, contrary to the Affidavits supporting *Costa's* 2255 Motion, the Government maintained that *Costa* would not have plead guilty, and that if such a plea was made, it would have been an ***Alford*** type plea. The Government based its position solely upon a letter *Costa* submitted to the District

Court after trial and before sentencing in an effort to evoke leniency from the Court by pointing out weaknesses in the Government's case, and stating that his wife and children need him. [Crim-D.E. 1037].

Costa maintained in his Reply to the Government's Response that he had acknowledged his full guilt to his brother and close friend, prior to trial, and that his plea would not have been an ***Alford*** plea. [Civ-D.E. 3].

Thereafter, without first conducting an evidentiary hearing -- Magistrate Judge Seltzer issued a Report and Recommendation to the District Judge on April 17, 1998, recommending that *Costa's* Petition be denied. [R1-1051]. On April 30, 1998, *Costa* filed a Motion for Reconsideration of Report and Recommendation. [R1-1052].

Rather than referring the motion for reconsideration back to the Magistrate Judge, the District Court treated said motion for reconsideration as an "objection" to the Report and Recommendation, and entered a Final Order of Dismissal and Order Denying Certificate of Appealability on May 12, 1998. [Civ-D.E. 4,5]. *See,* Pet. App. at 5-7.

Costa filed a Notice of Appeal and a Petition with this Court for a Certificate of Appealability, which was granted on January 12, 1999, as to the issue raised concerning ineffective assistance of trial counsel.

After full briefing in this cause, the Eleventh Circuit entered an unpublished decision on June 22, 1999, affirming the District Court's ruling, based upon

the following reasoning:

> We find no error in the magistrate judge's analysis of the appellant's claim and his conclusion that appellant failed to satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). Save appellant's bald allegations, there is nothing in the record that would permit the inference that, if appellant's multiple convictions were vacated and his not guilty pleas reinstated, (1) he and the Government would enter into a plea agreement that would require the district court (by effectively tying its hands) to impose sentence(s) more favorable (from a parole eligibility standpoint) than the sentences he is now serving, and (2) that the district court would accept the plea agreement and sentence him accordingly. In short, the appellant has failed to demonstrate that the outcome of his case would have been different but for counsel's ineffectiveness.

See, Pet. App. at 1-3.

A timely Petition for Rehearing *En Banc*, as filed on July 12, 1999. On September 15, 1999, the Eleventh Circuit entered an order denying the Petition

for Rehearing *En Banc. See,* Pet. App. at 4.

Thereafter, October 1, 1999, the Eleventh Circuit issued a Mandate on its June 22, 1999 Judgment.

ARGUMENT I

THE COURT BELOW, IN CONFLICT WITH THE OTHER CIRCUITS AND ITS OWN RULINGS, PLACED AN UNREASONABLE BURDEN UPON PETITIONER IN REQUIRING HIM TO SHOW THAT IF THE PETITION WAS GRANTED, (1) THE GOVERNMENT WOULD OFFER HIM A PLEA AGREEMENT WITH A LOWER PAROLE ELIGIBILITY DATE, AND (2) THE DISTRICT COURT WOULD ACCEPT THE PLEA AGREEMENT.

A. *No Court Has Required Such A Showing -- Even After an Evidentiary Hearing:*

In ***Hill v. Lockhart***, 474 U.S. 52, 106 S.Ct 366,

88 L.Ed.2d 203 (1985), this Court recognized that the ***Strickland***[1] test for ineffective assistance of counsel also applies to challenges to guilty pleas. This Court stated, *inter alia,* that in order to show prejudice, the petitioner must show that there is a "reasonable probability" that he would have not plead guilty and would have insisted on going to trial.[2]

Several Circuit Courts,[3] including the Eleventh

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[1] ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] Specifically, this Court stated:

> The . . . "prejudice," requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill, 474 U.S., at 56, 106 S.Ct., at 370.

[3] ***United States v. Gordon,*** 156 F.3d 376 (2nd Cir. 1998); ***Yarbrough v. United States,*** 51 F.3d 274 (6th Cir. 1995); and ***Iaea v. Sunn,*** 800 F.2d 861 (9th Cir. 1986). ***See also, Turner v. Tennessee,*** 858 F.2d 1201, 1208 (6th Cir. 1988) (requiring reinstatement of the original plea

Circuit,[4] have since applied ***Hill*** to ineffective assistance of counsel claims regarding gross misadvice regarding the potential length of the sentence if one goes to trial. However, none of the Circuits, with the exception of the Eleventh Circuit's opinion in the instant case, have required a petitioner to show that: (a) the Government presently would enter into a plea agreement with him that would require the district court to impose sentence(s) more favorable than the sentence he is now serving, and (b) that the district court would accept the plea agreement and sentence him accordingly.

In ***Coulter,*** the Eleventh Circuit specifically spelled out the showing necessary to support the claim the Petitioner raised herein. The Court, quoting this Court's opinion in ***Hill,*** stated:

> [t]he defendant must establish that

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offer unless the prosecution can show non-vindictive reasons for withdrawing the offer).

[4] ***Coulter v. Herring,*** 60 F.3d 1499 (11th Cir. 1995) (where a defendant decides not to take a plea, the failure to effectively advise a defendant regarding the consequences of taking a plea as opposed to going to trial may support a claim for ineffective assistance of counsel under ***Hill***), *cert denied,* 516 U.S. 1122 (1996); ***Yordon v. Dugger,*** 909 F.2d 474 (11th Cir. 1990); ***Holmes v. United States,*** 876 F.2d 1545 (11th Cir. 1989).

> "counsel's constitutionally ineffective performance affected the outcome of the plea process." In other words, in this instance, Coulter "must show that there is a reasonable probability that, but for counsel's errors, he would ... have pleaded guilty and would [not] have insisted on going to trial.

Coulter, 60 F.3d at 1503-04 (citations and footnote omitted)(added language in original).

B. ***The District Court Should Require the Government to Offer A Plea With a Lower Parole Eligibility Date or Re-Offer its Prior Plea In Order to Place the Petitioner Back in the Position He Would Have Been, Absent the Ineffective Assistance of Counsel:***

This Court has not yet addressed the issue of what remedy is appropriate where an accused, based upon counsel's advice, decides to go to trial rather than plead guilty, and such advice satisfies the ***Strickland*** test. The Ninth and Third Circuits have opined that the remedy that should be "tailored to the injury suffered." In ***United States v. Blaylock,*** 20 F.3d. 1458, 1468 (9th Cir. **1994),** the Ninth Circuit observed:

> Since the remedy for counsel's ineffective assistance should put the defendant back

> in the position he would have been if the Sixth Amendment violation had not occurred, in certain circumstances granting a new trial may not be the appropriate remedy. Several courts have recognized that where the ineffective assistance occurred before trial, as in cases where the harm consisted in defense counsel's failure "to communicate a plea offer to the defendant, .. [granting a] subsequent fair trial does not remedy this deprivation...."

Blaylock, 20 F.2d. at 1468 (citations omitted).

However, in the instant case, the Eleventh Circuit's holding showed that the court would not require the Government to re-offer the prior plea, or even a plea that would remedy the harm suffered by deleting the parole eligibility retardation provision from *Costa's* Judgment and Commitment.

Merely granting of a new trial, does not remedy the harm suffered. Requiring the Government to reinstate its original plea offer is constitutionally permissible, and not obviated by intervening circumstances. ***See, Mabry v. Johnson,*** 467 U.S. 504, 510, n. 11, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) and ***United States v. Morrison,*** 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). ***See also, Turner v. Tennessee,*** 858 F.2d 1201, 1208 (6th Cir. 1988)(requiring reinstatement of the original plea offer

unless the prosecution can show non-vindictive reasons for withdrawing the offer).

Furthermore, requiring the Government to reinstate its original offer would also accommodate the policy the Supreme Court articulated in ***Kimmelman v. Morrison,*** 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), where the Court held: "[t]he Constitution constrains our ability to allocate as we see fit [or the Government] bear the risk of constitutionally deficient assistance of counsel." 477 U.S. at 379, 106 S.Ct. at 2585. Thus, under ***Kimmelman,*** the risk of ineffective assistance of counsel should not be shifted to *Costa* by ordering a new trial or requiring him to prove that the District Court or the Government would reinstate the original plea offer -- after both have contested the relief he has sought.

Therefore, *Costa* urges this Court fashion a remedy for such petitioners, requiring the district courts to place them back in the position they would have been if the Sixth Amendment violation had not occurred - - by allowing the petitioner(s) to plead guilty in accordance with the plea agreement, or for the judgment and commitment to be modified to remedy the prejudice suffered.

ARGUMENT II

THE COURT BELOW ERRED IN DENYING *COSTA* AN EVIDENTIARY HEARING, BASED UPON A LACK OF SHOWING THAT IF THE PETITION WERE GRANTED, THE GOVERNMENT WOULD REINSTATE THE PRIOR PLEA OFFER OR A PLEA WITH NO PAROLE RETARDATION PROVISION.

Costa's 2255 Motion was denied without an evidentiary hearing, and his appeal simply challenged the denial of an evidentiary hearing.

Title 28 U.S.C. § 2255 provides that "[u]nless the motion and the files and records of the case ***conclusively show*** that the prisoner is entitled to no relief, the court ***shall*** . . . grant a prompt hearing thereon." *Id.* (emphasis added).

In ***Machibroda v. United States,*** 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), this Court considered this issue in the context of a Federal Prisoner's allegations that his pleas of guilty had not been voluntary, but were induced by promises of the prosecutor as to the length of his sentence. Like the instant case, the district court denied the petition without a hearing, and the court of appeals affirmed.

This Court, after noting the detailed facts alleged in the petition, held:

> We think the District Court did not proceed in conformity with the provisions of 28 U.S.C. s 2255, 28 U.S.C.A. s 2255, *when it made findings on controverted issues of fact without notice to the petitioner and without a hearing*. ***United States v. Hayman***, 342 U.S. 205, 220, 72 S.Ct. 263, 96 L.Ed. 232 (1951). The statute requires a District Court to 'grant a prompt hearing' when such a motion is filed, and to 'determine the issues and make findings of fact and conclusions of law with respect thereto' unless 'the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a

> kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.....

Machibroda v. United States, 368 U.S. 494-95, 82 S.Ct., at 513-14. (emphasis added).[5]

As argued above, however, the District Court and the Eleventh Circuit relied upon conclusions for which no sworn testimony exists in the Record. *Costa* never conceded that he would *not* have plead guilty had he been properly advised of the potential sentence herein if he went to trial, and it is uncontroverted that the effect of counsel's ineffectiveness is an additional four to ten years incarceration.[6] Further, in accordance with the tests set forth in ***Hill v. Lockhart*** and ***Coulter,*** as

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[5] ***See also, Townsend v. Sain,*** 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)(petitioner is entitled to an evidentiary hearing *if he alleges facts which, if proven, would entitle him to relief*); *see, e.g.,* ***Futch v. Dugger,*** 874 F.2d 1483 (11th Cir. 1989) ***Ladd v. Jones,*** 864 F.2d 108 (11th Cir.1989)(per curiam).

[6] The Government's plea offer provided for a maximum term of 16 years incarceration, which would have resulted in *Costa* being parole eligible after 10 years incarceration. However, under the present sentence, *Costa* is not parole eligible until after service of 20 years incarceration.

argued in this Petition, *Costa's* 2255 Motion satisfied both prongs of ***Strickland.*** Accordingly, the lower courts erred in denying *Manuel Costa* an evidentiary hearing.

CONCLUSION

For all the foregoing reasons, therefore, *Manuel Costa* respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 14th day of December, 1999, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; ***Karen Atkinson, Esq.,*** Assistant U. S. Attorney, 500 Australian Avenue, 4th Floor, West Palm Beach, FL 33401, and to the ***Office of the U. S. Attorney, Appellate Division,*** Attn: Kathleen M. Salyer, Esq., 99 N.E. 4th Street, Miami, FL 33130.

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